

No. 12371

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

F. E. THIBODO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition of Appellant F. E. Thibodo for a Rehearing;
or for the Court, of Its Own Motion, to Correct Its
Decision Filed Herein Under Date of February 15,
1951.

FILED

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PAUL P. O'BRIEN,
CLERK

GEORGE W. CROUCH,

2125 Oak Street, Los Angeles 7,

Attorney for Appellant.

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Brief Statement of Grounds.

1. The decision is in error where on page 8 thereof, after declaring that the condemnor could have withheld the amount of the lien in favor of the rightful claimant, it declares "Just what was done in this regard the pleadings do not reveal."

The error consists in the fact that the pleadings do reveal what was done, as shown by transcript pages 4-9 and 10. Since this error substantially affects the final determination of the Court, we detail it in the argument.

2. The language of the decision on page 11 thereof that one seeking relief on constitutional grounds must first exhaust his State remedies is erroneous. The decision had previously declared that there was no remedy open to the plaintiff, save that of foreclosure, and the doors to that remedy were closed when the Government took the land.

3. The decision is in error on pages 11 and 12 thereof in its declarations with respect to following the condemnation fund. A single case, *Rose v. Conklin*, 52 Cal. App. 225, is cited, as authority therefor. The case has no application because the funds there were intact. It was simply a case of being subrogated to the award.

We urge that the right of the Government to follow an erroneous award has nothing to do with any limitation on the right of a citizen to take advantage of the benefits of the Fifth Amendment. The decision cites no other cases neither does it otherwise discuss the question.

4. The decision is in error in directing plaintiff to amend his complaint.

Argument.

The decision of the Court upholds the Appellant's position that the Constitution guarantees to him compensation for his property taken for Public Use, and that where he has been deprived of his property in violation thereof, and without his day in court, he has a right of action within the meaning of Title 28 U. S. C. A., Sec. 1346(2). It overturns the finding of the trial court to the effect that the Government was under no obligation to make the Appellant a party defendant in a condemnation action directed against the property to which his bonds related, or to serve him with process. The decision also overturns the finding of the trial court to the effect that the City Treasurer's Record of the Plaintiff's bonds constituted neither actual nor constructive notice to the United States of the existence thereof, or rights of property arising thereunder.

The decision of this Court then proceeds to very correctly declare (pp. 6 and 7) that upon default in payment upon the bonds, two remedies are open to the bondholder; one a foreclosure through the City Treasurer, the other a suit in foreclosure in the court. Then the decision states: "Both of the above doors to recovery on his bonds were closed to the plaintiff when the United States exercised its power over the land in 1943."

The only construction to be accorded to this language is that the sole remedy in favor of the bondholder is one of foreclosure, and even that remedy becomes non-existent

whenever the United States has exercised its power over the land. Hence there is no possible remaining remedy which the plaintiff could thereafter exhaust.

Appellant first complains of an error of this Court in its decision, where (on p. 8 thereof) it states that the condemnor, having constructive knowledge of the bonds, could have withheld the amount of the lien for its rightful claimant, and concludes with the following statement:

“Just what was done in this regard the pleadings do not reveal.”

This statement overlooks the allegation of the plaintiff's complaint [Tr. p. 4] which sets forth that the condemnation action instituted by the Government “has proceeded to judgment, the payment by the Government of the awards thereby imposed, all without service of process upon this plaintiff, any appearance by him, any compensation to him, or any adjudication respecting it, or any other act savoring of due process of law.” Again on Transcript page 9 the plaintiff in his complaint declared “That the plaintiff was neither a party to said action No. 172-SD, nor was he ever served with summons. That no provision has been made for the payment of the bonds of the plaintiff, and no adjudication has been made respecting it. That plaintiff has never received any compensation for such bonds. That the defendant refuses to pay plaintiff anything in lieu thereof.”

Again [at Tr. p. 10] plaintiff alleged that there never had been any other action or proceeding on the part of the

United States to determine the rights of property of the plaintiff.

Appellant next complains of the language of the decision on page 11 thereof that one seeking relief for the violation of Constitutional rights must first exhaust his remedies in the State Courts (citing *Phyle v. Duffy*, 334 U. S. 431). The law of that decision could have no application here, for the reason that by virtue of the previous language of this Court of Appeals, in this very decision, there never existed any remedy save that of foreclosure, and the doors to that remedy were closed when the Government exercised its power over the land. Another reason is that it was a criminal case, involving alleged due process of law, and not a direct action against the Government for compensation.

We next complain of the decision on pages 11 and 12 thereof with respect to the lien of the claimant following the condemnation fund, in which it is declared that he may follow the fund even after it has been paid out to others. In support thereof the decision cites *Rose v. Conklin*, 52 Cal. App. 225. There are no other citations, or further discussion of this declaration. Whatever right might exist in any case could not constitute a defense to the violation of the constitutional right. Not even a trustee could defend the violation of a duty owed his *cestui que* trust on the ground that he had a right of recovery for funds wrongfully expended, much less to require the *cestui que* trust to pursue the malefactor, or follow the ownership of the funds *ad infinitum*.

Let us see however what *Rose v. Conklin*, *supra*, actually holds. On pages 230 and 231 they discuss whether the plaintiff might have injected herself into the condemnation

action and had her rights determined. They then say: "But the plaintiff was not bound to inject herself into that case."

There the plaintiff had begun her suit for foreclosure before the commencement of the condemnation action. She obtained a deed thereunder while the condemnation action was still pending. The appeal had not been determined nor the funds paid out (bottom of p. 231 and top of p. 232).

All this is only to the effect that having become again the sole owner of the land, she was entitled to be subrogated to the award.

We next complain of the declaration on page 12 of the decision to the effect that the plaintiff should be given an opportunity to amend his complaint to show that he has exhausted the State remedy or that this relief is not available to him, or pursuit thereof would be fruitless.

We have shown that the only remedy was of foreclosure and that is exhausted. We also have shown that the entire condemnation awards have been paid out and no provision made for the plaintiff and no compensation to him, and no adjudication respecting his rights. That leaves only one thing, and with respect to which, the next trial judge will be just as uncertain and confused as we are: namely, does the decision mean that we must plead that we have attempted by suit to follow the devious course of the moneys that have been paid out, respecting all of these bonds, or show that it would be fruitless to do so. This brings us to the point in the case that ought to be directly answered. That question stated as we conceive it to be is this: Is the mandate of the Fifth Amendment imposing on the Government the obligation of providing

compensation and conforming to due process of law a primary and unqualified one, or is the right dependent on the injured party being saddled with the delinquencies and mistakes made by the Government and being first forced to sue and exhaust his remedy against third parties before he can avail himself of his constitutional right.

Under our review of the decision, the above question is all that remains. If the plaintiff is right in his construction of the law the case should go to trial on the merits, and there is nothing requiring further amendment of the complaint.

At all events we believe that, in the interest of clarity, and for the purpose of resolving at this time all that is now properly before this Court, the opinion should be reconsidered and corrected.

If this can properly be done under the presentations and arguments of counsel already made, such corrections may afford a complete remedy; otherwise plaintiff asks for a rehearing on the grounds specified and herein argued.

Respectfully submitted,

F. E. THIBODO, *Appellant*,

By GEORGE W. CROUCH,
His Attorney.

Certificate of Counsel.

The undersigned, George W. Crouch, who is attorney of record for the plaintiff in the above entitled action, and on appeal from a judgment of dismissal entered therein by the lower court, does hereby certify to the United States Court of Appeals, for the Ninth Circuit, that in his judgment the petition is well founded, and the grounds presented in support thereof meritorious, and that the petition is not interposed for delay.

GEORGE W. CROUCH.

Dated February 28, 1951.